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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-75

THE STATE OF GEORGIA, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLANTS

This is an appeal from an order of a three judge District Court for the Northern District of Georgia, entered on April 19, 1972, enjoining the State of Georgia from holding elections under the 1972 and 1971 reapportionment acts for its House of Representatives. Appellants are the State of Georgia, the Georgia General Assembly, Governor Jimmy Carter, Secretary of State Ben W. Fortson, Jr., and William F. Blanks, M. M. Smith, Matthew Patton and Melba Williams, members of the State Election Board.

OPINION BELOW

The opinion of the three-judge District Court (A. 72) is not yet reported.

JURISDICTION

This suit was instituted on behalf of the United States based upon Sections 5 and 12(d) of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. §§1973c and 1973j(d), to enjoin the State of Georgia and the other appellants (defendants) from holding elections pursuant to the reapportionment acts for the House of Representatives adopted by the Georgia General Assembly on March 9, 1972, and October 14, 1971.

A three-judge court was sought and convened, based upon 28 U.S.C. §2284 and Section 5 of the Voting Rights Act of 1965, 42 U.S.C. §1973c (A. 7).

The injunction of the three-judge District Court was entered on April 19, 1972 (A. 75-76), and was stayed by this Court on April 21, 1972 (No. A-1106). Notice of Appeal was filed in the District Court on May 17, 1972 (R. 370). Appellants' Jurisdictional Statement was filed on July 14, 1972, and probable jurisdiction was noted on October 16, 1972.

The jurisdiction of this Court to review the order and decision of the District Court by direct appeal is conferred by 28 U.S.C. §1253 and 28 U.S.C. §2101(b), as well as Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provision directly involved in this case is the 15th Amendment, particularly Section 2, and in connection therewith, Sections 1, 2 and 4 of Article

IV, and the 9th and 10th Amendments. Sections 1 and 2 of Article III are also involved. All of these provisions are set forth in the appendix to this brief.

The statutes which are involved are Sections 4 and 5 of the Voting Rights Act of 1965 (as amended) (42 U.S.C. §1973 b, c), and 5 U.S.C. §301, and 28 U.S.C. §§509 and 510, set forth in the appendix to this brief.

The regulations involved are the "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" adopted by the United States Attorney General, 28 C.F.R. 51, particularly "Authority" and Sections 51.3(a),(b), 51.10, 51.18(a), 51.19, and 51.26(a), set forth in the appendix to this brief.[1]

QUESTIONS PRESENTED

This appeal raises four questions, all relating to Section 5 of the Voting Rights Act of 1965, and each dependent upon an affirmative answer to the preceding question or questions.

1. Is Section 5 of the Voting Rights Act applicable to State legislative reapportionment acts, and if so, is Section 5 constitutional as thus applied?

2. Does Section 5 empower the U.S. Attorney General to disapprove the use of multi-member legislative districts, in combination with designated posts and the majority (runoff) election requirement, when a State subject to Section 5 (Georgia) was using all three prior to November 1, 1964 (the effective date of Section 5); i.e. can the Attorney General disapprove an election

[1] To avoid confusion between the appendix to this brief and the single appendix, all citations in this brief to the appendix are references to the single appendix. For convenience, an index of the constitutional provisions, statutes and regulations involved in this case precedes the appendix in this brief.

system, in principle, when there has been no change, in principle, in such election system?

3. Does Section 5 empower the Attorney General to disapprove a State law which he does not find to be discriminatory, but about which he says: "Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting"; i.e., about which the Attorney General is unable to reach a decision?

4. Does the Attorney General have the power to extend the 60 day time limit Congress placed on him in Section 5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

This Court decided *Whitcomb v. Chavis*, 403 U.S. 124, on June 7, 1971.

In the fall of 1971, following receipt of the 1970 Census, the Georgia General Assembly met in extraordinary session to reapportion its legislative and congressional districts for the 1972 elections (Ga. Laws 1971, Ex. Sess., pp. 1-3). The three acts (House, Senate and Congressional) were submitted to the United States Attorney General, with explanatory maps and data, on November 5, 1971 (A. 32). The material submitted in connection with the House reapportionment act is shown by exhibit 6 to the complaint filed in this action (A. 19). The act showed on its face that it contained 105 districts, including 49 multi-member districts, for the 180 member House (R. 21-51). Both the new (1971) and old (1968) House reapportionment acts were submitted (R. 21, 56), with the available maps of the old and new districts (see Complaint exhibit 6, A. 19 at 21), and with the population variances for each new district (A. 20).[3]

On November 19, 1971, Mr. David L. Norman, As-

sistant Attorney General, Civil Rights Division, wrote the Georgia Attorney General, in pertinent part, as follows (A. 39):

"After a preliminary examination of the initial submission, this Department has determined that the data sent to the Attorney General are insufficient to evaluate properly the changes you have submitted. In accordance with Sections 51.10(a)(6) and 51.18 (a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (36 Federal Register 18186-18190, September 10, 1971), would you please assist us by providing this Department the following additional information:

"1. The 1970 Census population, by race, for the 1964, 1968, and submitted (1971) State House and Senate districts, and for the old (1964) and new (submitted) Congressional districts.

"2. 1970 Census maps showing the precise district boundaries for any submitted State Senate or State House district which divides any county or city. (Such maps have already been submitted for the metropolitan areas of Atlanta, Savannah, Augusta, Columbus, and Cobb County for submitted House districts and for the metropolitan areas of Atlanta, Albany, Macon, Augusta, Savannah, and Columbus for submitted Senate districts).

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[3] The racial distribution within the districts was not submitted to the Attorney General on November 5, because, as explained to him (A. 19), the General Assembly had contracted with the Computer Center at the University of Georgia to assist in establishing equal districts and the contract prohibited the Center from programming racial data (A. 21), and because the racial data was available to the Attorney General from the Bureau of the Census and his regulations provided (or at least implied) that a State need not furnish information available to him from the Census Bureau [28 C.F.R. 51.10(b) (6) (i)].

"3. Maps showing the precise district boundaries for any State Senate or State House district in the 1968 redistricting plan which divides any county or city.

"4. A statewide map showing the State Senate and State House Districts in the 1964 redistricting plan, and maps showing the precise district boundaries for any such districts which divided any county or city.

"5. A history (for the last two elections) of every primary or general election contest for State Senate, State House, and for United States Congress in which there were one or more black candidates running. This history should include for each such contest the district involved, the names of the candidates (designated by race), and the number of votes received by each candidate.

"6. The name, home address, and race of each present State Senator, State (House) representative, and U. S. Congressman from Georgia.

"7. A legislative history of each submitted redistricting plan (the names of the sponsoring legislators for each of the three final bills, copies of all proposed alternative plans, the date and names of sponsoring legislators for each proposed alternative plan, and the names of legialators who voted in opposition to each of the final bills and to each of the proposed alternatives).

"As you know, the Attorney General has a 60-day period to consider enactments submitted pursuant to Section 5. As is provided in Section 51.18(a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, the 60-day period

will not commence until the above-requested information, completing your submission, is received by the Department."

At the time of writing that November 19 letter, Mr. Norman already knew that the House reapportionment plan contained multi-member districts (R. 21-51).

The "additional information" requested by Mr. Norman's letter of November 19, 1971, included, as number one of seven items, the 1970 census population, by race, for the 1964 [sic, 1965], 1968, and submitted (1971) State House Districts (as well as for the 1964, 1968, and 1971 Senate Districts, and the 1964 and 1971 Congressional Districts). In order to furnish the additional information called for by this item, it became necessary to program the computer containing the 1970 census population with the racial breakdown of that population and with the 1965 and 1968 House districts (as well as the 1964 and 1968 Senate districts), which districts had not previously been described by the geographic units used by the Bureau of the Census.[8]

On January 6, 1972, the "additional information" requested by Mr. Norman was furnished to him by the State (A. 33).

On Friday, March 3, 1972 (within 60 days of January 6, but approximately 120 days after the November 5 sub-

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[8] The finding by the court below that the State "withheld" (A. 74) the additional information sought by the Attorney General is unsupported by any evidence in the record and is contrary to the facts. The United States did not even contend before the lower court that the information was "withheld" (see A. 32-33, Para. 9-11). Although not a part of the record, the fact is that the University of Georgia Computer Center devoted a total of 979 hours to this effort between November 19, 1971, and January 6, 1972, at an actual direct cost of $7,118.51. The Center opened and worked over the Thanksgiving holidays, and the Christmas holidays as well, times when it ordinarily would have been closed.

mission, appellants contend), the U. S. Attorney General objected to the combination of multi-member districts, numbered posts and majority (runoff) requirement, saying (A. 10-11):

> "An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgement of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."

This objection was received by the General Assembly on Monday, March 6, at which time the legislature had only four days remaining in its 1972 regular (40 day) session (Ga. Const. Art. III, Sec. IV, Par. III, as amended in 1962; Ga. Code Ann. §2-1603). In those four days, the House of Representatives divided such multi-member districts into single member districts as it was able to (dividing 18 multi-member districts and leaving 32). It also adopted a resolution, addressed to the Attorney General, pointing out that it had not "changed" in its use of multi-member districts, designated posts, and majority (runoff) requirement (A. 17). The amended House reapportionment act (1972) also was submitted to the Attorney General, and was objected to by him on March 24, 1972, on the ground that it continued to use multi-member districts, numbered posts and the majority (runoff) requirement (A. 13).

The foregoing events all transpired following this Court's decision in *Whitcomb v. Chavis*, 403 U. S. 124, *supra*, on June 7, 1971, reversing the District Court's ban on the use of multi-member legislative districts.

In order to complete this statement of the case, it becomes necessary to go back in time. The State of Georgia commenced using multi-member districts in its House of Representatives as early as 1880 (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51). Following the census of 1960, there was a reapportionment of the Georgia House of Representatives, by which 8 counties were entitled to three Representatives, 30 counties were entitled to two Representatives, and the other 121 counties were entitled to one Representative (Ga. Laws 1961, p. 111). Thus, in 1961, Georgia had 38 multi-member districts in its House of Representatives.

Georgia began designating posts (seats) in multi-member districts in Fulton County in 1925 (Ga. Laws 1925, p. 205), and as more and more such local laws were enacted, a statewide designated post law was adopted in 1953 (Ga. Laws 1953, Nov. Sess., p. 269; Ga. Code Ann. §47-119). Candidates for these multi-member districts were required to designate the specific seat they were seeking, by naming the incumbent they desired to oppose. Because the largest multi-member districts consisted of three Representatives, the names of the incumbents, rather than numbers, were used to designate the posts, from 1953 to 1965.

Georgia's majority (runoff) election requirement (as opposed to the plurality vote requirement) commenced as to some offices as early as 1917 (Ga. Laws 1917, pp. 183-184). It was made applicable to legislators in pri-

maries in 1962 (Ga. Laws 1962, p. 1217 at p. 1218), and, at a special session of the General Assembly held in the summer of 1964, the majority vote requirement was made applicable to legislators in elections as well as primaries (Ga. Laws 1964, Ex. Sess., p. 26 at pp. 174-175, approved June 24, 1964).[4]

In the summer of 1964, prior to the 1964 presidential election, then Governor Carl Sanders called the General Assembly into special session (May 4—June 25) for the purpose of revising Georgia's Constitution and election laws (Ga. Laws 1964, Ex. Sess., pp. 1-3). The Georgia Election Code of 1964 was approved June 24, 1964 (Ga. Laws 1964, Ex. Sess., pp. 26-220; Ga. Code Ann. Title 34). The designated post (name-the-incumbent) requirement for House members was made applicable to all offices by Ga. Code §34-1002 (Ga. Laws 1964, Ex. Sess., at p. 89; now Ga. Code §34-1015), and the majority vote requirement, as heretofore noted, was made applicable to legislators in elections by Ga. Code §34-1514 (Ga. Laws 1964, Ex. Sess., at pp. 174-175) (now Ga. Code §34-1513).

Under the 1961 reapportionment and the 1964 Election Code, the Georgia General Assembly had 38 multi-member House districts, designated posts and majority (runoff) requirement. That was the law in Georgia as of the summer of 1964, and that was the way Georgia's House members were elected in the fall of 1964.

Thus, prior to November 1, 1964, the effective date of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c), Georgia was using multi-member districts, des-

[4] See *Bond v. Fortson*, 334 F.Supp. 1192 (N.D. Ga. 1971), *aff'd.* 404 U.S. 930 (1971).

ignated posts and the majority (runoff) election requirement as to its House of Representatives. The Attorney General objected in 1972, appellants submit, to Georgia's use of an election system which has not changed since June 24, 1964.[5]

Following *Reynolds v. Sims*, 377 U.S. 533 (1964), the District Court had ordered, on June 30, 1964 (amended November 3, 1964), that members of the Georgia House to be elected at the 1964 General Election hold office for only one year and that the House be reapportioned at the 1965 Regular Session. *Toombs v. Fortson*, 241 F.Supp. 65, 67 (N.D. Ga. 1965).

At the 1965 Regular Session, the Georgia General Assembly responded to the District Court's reapportionment order (Ga. Laws 1965, p. 127), creating 44 multi-member House districts, increasing the representation of many counties (e.g. Fulton County's representation went from 3 to 24, including 3 at-large), and decreasing the representation of many others (e.g. the representation of Lanier, Atkinson, Clinch and Echols Counties went from 4 to 1).

Due to this extensive House reapportionment in 1965, designation of posts by naming the incumbent was no longer feasible and the 1965 reapportionment act changed the post designation requirement for House members from

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[5] Following the 1964 presidential election, the Voting Rights Act of 1965 was introduced in Congress on March 18, 1965, and was approved August 6, 1965. The effective date of Section 5 was made retroactive to November 1, 1964. The Georgia Election Code of 1964 was adopted before the 1964 presidential election and before the Voting Rights Act of 1965 was introduced in Congress.

names of incumbents to numbers (Ga. Laws 1965, p. 127 at pp. 172-173).[6]

As heretofore noted, following release of the 1970 census figures in September, 1971, Governor Carter called a special session of the Georgia General Assembly, which met from September 24 to October 8, to reapportion the House, Senate and Congressional Districts (Ga. Laws 1971, Ex. Sess. pp. 1-3). The House reapportionment act, approved October 14, 1971, and containing 49 multi-member districts, was submitted, appellants contend, to the Attorney General on November 5, 1971. It was disapproved on March 3, 1972. In the closing days of its 1972 session, the General Assembly divided as many multi-member districts as it could in four days, leaving 32 such districts. The 1972 House reapportionment act was disapproved by Mr. Norman's letter dated March 24, 1972.

This suit was instituted March 27, 1972, in the United States District Court for the Northern District of Georgia seeking to enjoin the State from implementing its

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[6] The 1965 reapportionment act was approved by the District Court as an interim plan for use until the 1968 elections. *Toombs v. Fortson*, 241 F.Supp. 65, 71, 73 (N.D. Ga. 1965). It was reapproved by that Court in *Toombs v. Fortson*, 275 F.Supp. 128 (1966), and by this Court in *Toombs v. Fortson*, 384 U.S. 210 (1966). At the 1967 session of the General Assembly, the House was reapportioned pursuant to the 1965 order, with 46 multi-member districts (Ga. Laws 1967, pp. 187-220). The use of numbers to designate posts was continued (Ga. Laws 1967, p. 187 at p. 219). In *Toombs v. Fortson*, 277 F.Supp. 821 (1967), the District Court approved "the proposed reapportionment in substantial degree" (277 F.Supp. at 823), but required certain changes (277 F.Supp. at 833-839). At its next (1968) session, the General Assembly complied with the Court's 1967 order (Ga. Laws 1968, pp. 209-247), repeated the numbered post provision (Ga. Laws 1968 at p. 246), and by Final Judgment dated May 13, 1968 (Stipulation Exhibit G, R. 326), obtained the District Court's express and final approval of the House reapportionment plan, containing 47 multi-member districts.

reapportionment acts of 1971 and 1972. Defendants raised four special defenses, which defenses appear as the questions presented in this appeal (A. 24-27).

Hearing on those four questions was held on the afternoon of April 14, 1972 (A. 47). The court reconvened on the afternoon of April 18, announced that the State's four defenses would be overruled, called for discussion as to the relief to be granted, and received the Interim Report of the Government (A. 58, 59).[1]

In its Interim Report, the Government withdrew its objection to 17 multi-member districts it previously had objected to, retaining its objection as to 15 such districts (A. 59, 67-68). This corrective maneuver came too late to be acted upon by the General Assembly, which had adjourned at the conclusion of its 40 day session. Moreover, the Government volunteered that the District Court should consider requiring that all multi-member districts be subdivided, even those 17 not then objected to (A. 60-61, 70).

The District Court expressed the view at the April 18 hearing that if the 17 districts not then objected to by the Justice Department were subdivided, the multi-member question would be moot, and that it would be risky to have a special session of the legislature, to commence April 24, and not subdivide those 17 districts (A. 64).

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[1] Appellants do not consider that the United States of America, except as a legal entity, instituted this action. We do not consider that the United States Attorney General, occupied with many matters, disapproved Georgia's reapportionment plans. (He did not sign the letters of disapproval.) Thus, plaintiff-appellee will be referred to herein occasionally as the Government, and the Attorney General as the Justice Department, in accord with the facts of the case.

The order of the District Court was issued on April 19, 1972. The Court did not rule on the Government's suggestion that all multi-member districts be subdivided (A. 75, fn. 4). It did, however, enjoin the State from conducting elections under the 1971 and '72 House of Representatives reapportionment acts. Uncertain as to whether it must subdivide 15 or 32 districts, the General Assembly nevertheless prepared to convene in extraordinary session on April 24, 1972 (A. 75).

This Court granted a stay of that injunction on April 21, 1972 (No. A-1106), and the Government's motion to vacate the stay was denied on May 5, 1972.

(In a companion case, *Millican v. Fortson*, the District Court ordered reapportionment of the Georgia Senate, which order was stayed by this Court, No. A-1105, also on April 21, 1972. The Jurisdictional Statement in the appeal of that case, *Fortson v. Millican*, No. 72-76, is pending.)

SUMMARY OF ARGUMENT

1. Section 5 of the Voting Rights Act of 1965 has not been held by this Court to be applicable to reapportionment. This question was expressly excluded from the decision in *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969). *Perkins v. Matthews*, 400 U.S. 379, 390-391 (1971), followed *Allen* but did not extend it to include reapportionment.

If Section 5 were applicable to reapportionment, it would be unconstitutional *as applied*. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), did not hold Section 5 to be valid *as applied* to reapportionment.

The 15th Amendment does not empower Congress to require certain States to submit their reapportionment (and redistricting) acts to the Justice Department for approval, for the reason that the formula for determining which States must submit (literacy tests and poor voter turnout in the 1964 presidential election) is wholly unrelated to reapportionment. Therefore, a requirement of submission of reapportionment acts by the covered States is not "appropriate legislation" within the authorization given Congress in the 15th Amendment.

2. In the case at bar, the Justice Department disapproved Georgia's use of multi-member legislative districts, per se, contrary to *Whitcomb v. Chavis*, 403 U.S. 124 (1971), notwithstanding Georgia's use of multi-member districts since 1880.

Section 5 requires submission only of voting laws ". . . different from that in force or effect on November 1, 1964. . . ." It requires submission only of *new* voting regulations, *Katzenbach, supra*, 383 U.S. at 334. It requires submission of any *change* in election laws, *Allen, supra*, 393 U.S. at 549.

The Justice Department has no power under Section 5 to disapprove an election system it does not like but which has not changed. *Whitcomb v. Chavis, supra*, prohibits District Courts from eliminating multi-member districts *in toto* within a state, without justified findings of fact as to each such district. The Justice Department should not be permitted to circumvent *Whitcomb*.

3. The Attorney General did not find Georgia's use of multi-member districts to be discriminatory. He found that he was ". . . unable to conclude that the plan does

not have a discriminatory racial effect on voting." (A. 11).

The Attorney General has adopted regulations putting the same burden of proof on the submitting State as it would have in court (28 C.F.R. 51.19), notwithstanding the provision of Section 5 that the Attorney General's approval may be obtained "without such proceeding".

"The Attorney General does not act as a court in approving or disapproving the state legislation." *Allen, supra,* 393 U.S. at 549.

By applying a burden of proof, the Attorney General has assumed performance of a judicial function (28 C.F.R. 51.19) without any notice of charges to the submitting State and without any right to call witnesses or to cross-examine objectors.

The adoption of a burden of proof provides the Attorney General with the option of not deciding whether a change has the purpose or effect of denying or abridging the right to vote, with the result that State laws are suspended (vetoed) without decision (i.e., by indecision). Section 5 clearly shows that if the Attorney General is unable to decide within sixty days, the change should go into effect, subject to the rights of private litigants to pursue their rights in court (". . . neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure").

4. Congress put a 60 day time limit on the Attorney General in Section 5. Nevertheless, the Attorney General has promulgated regulations (28 C.F.R. 51.10, 51.18) which purport to give him an extension of time.

There is no authority for those regulations. Moreover, such regulations contravene the 60 day time limit set by Congress. The federal government owes the submitting States obedience to the time limit fixed by Congress, in order to carry out the congressional intent to provide covered States with a rapid method of rendering new laws enforceable. *Allen, supra*, 393 U.S. at 549.

ARGUMENT

1. If Section 5 of the Voting Rights Act Is Applicable to Reapportionment, It Is Unconstitutional As Applied.

The primary question in this appeal is whether Section 5 of the Voting Rights Act of 1965 (42 U.S.C. §1973c) is applicable to reapportionment acts, and if so, whether Section 5 is constitutional as applied.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court expressly declined to decide whether Section 5 is applicable to reapportionment, saying (393 U.S. at 569):

> "Also, the question of whether §5 might cause problems in the implementation of reapportionment legislation is not properly before us at this time. There is no direct conflict between our interpretation of this statute and the principle involved in the reapportionment cases. The argument that some administrative problem might arise in the future does not establish that Congress intended that §5 have a narrow scope; we leave to another case a consideration of any possible conflict."[8]

[8] This administrative problems have arisen (J.S. 13-14).

The question properly left unanswered in *Allen* is the primary question in the case at bar.

Allen, supra, arose from Virginia. It was decided jointly with three cases from Mississippi, *Fairley v. Patterson, Bunton v. Patterson,* and *Whitley v. Williams,* 393 U.S. 544 (1969). The Virginia case, *Allen,* involved a change in procedures for casting write-in votes. *Fairley* involved a change from district to at-large election of county supervisors. *Bunton* involved a change from election to appointment of county superintendents of education. *Whitley* involved changes in procedures for independent candidates gaining positions on the general election ballot.

The Mississippi appellees contended in *Fairley* that Section 5 was not intended to apply to a change from district to at-large elections, because such an application, they feared, would cause a conflict in the administration of reapportionment legislation (393 U.S. at 564).

The United States, in its *amicus* brief in the Mississippi cases, replied that ". . . none of the instant cases involve the typical sort of apportionment or districting questions presented in the cases to which respondents make reference." (Memorandum of the United States as Amicus Curiae, filed in *Fairley, supra,* at p. 23, hereinafter referred to as the Government's *Fairley* Brief). Then, referring specifically to *Fairley* (change from district to at-large elections), the Government said (*ibid* at pp. 23-24):

> "Nonetheless, the case does not fit into the ordinary pattern of apportionment and districting litigation, and thus a holding that Section 5 is applicable in these circumstances would not be tantamount to concluding that the prescribed approval procedure

> relates to all changes in the affected States relating to apportionment and districting of governmental bodies."

We read the Government's brief to say: "Your Honors, your holding that Section 5 is applicable in *Fairley* will not be tantamount to concluding that Section 5 is applicable to reapportionment and redistricting."

Yet, in the court below the Government argued, successfully, that *Fairley* (and *Perkins v. Matthews*, 400 U.S. 379, to be discussed below) "clearly resolves" the question of the applicability of Section 5 to reapportionment (R. 170, Plaintiff's Brief, p. 7). (Compare the approach of the Solicitor General at page 5 of his Memorandum for the United States, filed in the instant case, where he states that the language of this Court's opinions in *Allen* and *Perkins* "strongly supports" the conclusion of the court below.)

In *Fairley*, the Government stated (Government's *Fairley* Brief, *supra*, at p. 22):

> "In any event, there is no need here for the Court to reach the question whether Section 5 extends to the typical sort of apportionment litigation and districting changes which have followed in the wake of this Court's decisions in *Baker v. Carr*, 369 U.S. 186 . . . ."

And this Court did not reach that question, *Allen*, 393 U.S. at 569.

In view of its position in *Fairley*, the Government should not now be heard to say that this Court there found Section 5 to be applicable to reapportionment. In *Fairley*, the Government took the position that, as regards

Section 5 of the Voting Rights Act, a change from district to at-large election of county supervisors is not in the same category as reapportionment (Government's *Fairley* Brief, pp. 23-24). We here adopt that position of the Government.

Perkins v. Matthews, 400 U.S. 379 (1971), mentioned above, involved (a) changes in locations of polling places, (b) changes in municipal boundaries through annexations, and (c) a change from ward to at-large election of aldermen. Finding these changes subject to Section 5, a majority of this Court followed *Fairley* and the interpretation given Section 5 by officials of the Justice Department, as shown by the Government's *Fairley* Brief, and by their testimony before a Senate Subcommittee, *Perkins*, 400 U.S. at 390-392.

Perkins followed *Allen (Fairley)*, as Mr. Justice Blackmun, joined by The Chief Justice, observed. *Perkins*, 400 U.S. at 397. However, relying on the interpretation of officials of the Justice Department, it can still be said:

> "Nonetheless, the case [*Perkins*] does not fit into the ordinary pattern of apportionment and districting litigation, and thus a [the] holding that Section 5 is applicable in these circumstances would not be tantamount to concluding that the prescribed approval procedure relates to all changes in the affected States relating to apportionment and districting of governmental bodies." (Government's *Fairley* Brief, pp. 23-24, matter in brackets added.)

Thus, we are at this point: This Court has not decided whether Section 5 is applicable to reapportionment and redistricting. It did not decide that question in *Allen* and it did not do so in *Perkins*. The question remains, is reapportionment subject to Section 5?

The legislative history has been set forth extensively in *Allen* and *Perkins*, and no useful purpose would be served by retraversing ground covered there (*Perkins*, 400 U.S. at 398, opinion by Mr. Justice Harlan). (It should be clear, nevertheless, that members of the House of Representatives, by their silence on a subject vital to themselves, showed that they did not consider congressional redistricting to be subject to approval by the Attorney General.)

There is new evidence, however, of the interpretation of the statute by the officers charged with its administration.

Mr. David L. Norman, speaking on behalf of the Attorney General, on behalf of the administration and on behalf of the Civil Rights Division of the Justice Department, stated that he participated in the drafting of the Voting Rights Act of 1965 [Hearings before the Civil Rights Oversight Committee (Subcommittee No. 4) of the Committee on the Judiciary, House of Representatives, on the Enforcement of the Voting Rights Act (May 26, 1971), at pp. 5-6]. Upon informing the Subcommittee that on May 25, 1971, the Attorney General announced proposed guidelines to implement Section 5 (*ibid.* at pp. 5-6), Mr. Norman was asked why no guidelines had been needed prior to May, 1971 (*ibid.* at 68). He testified (*ibid.* at 68):

> "I think it is a combination of the two Supreme Court decisions which really opened up a wide range of things that had to be submitted.
>
> "We didn't formerly think that reapportionment as such had to be submitted, or annexation. I think the

> submitting authorities thought a lot of things didn't have to be submitted."

Here is Mr. Norman, a drafter of the 1965 Act, the man in charge of the Civil Rights Division, testifying on behalf of the Attorney General that "We didn't formerly think that reapportionment as such had to be submitted. . . ." *(Ibid.)*

Reapportionment simply is not a "voting qualification or prerequisite to voting, or standard, practice, or procedure *with respect to voting*" within the meaning of Section 5.

If Section 5 is to be applied to reapportionment, the question remains, is it constitutional as applied? The "as applied" question was not decided in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

This Court considered the facial constitutionality of certain sections of the 1965 Voting Rights Act in *Katzenbach, supra*. It did not rule on the validity of the entire Act (383 U.S. at 307, 316, 337). It did not rule on the *application* of Section 5 to reapportionment. In that case, Section 5 was held valid against two attacks—that it violated Article III by directing the District Court in Washington to issue advisory opinions (383 U.S. at 323, 335), and violated the due process clause by limiting litigation to a distant forum (383 U.S. at 323, 331). The due process argument was defeated because a State is not a "person" (383 U.S. at 323-324). In the case at bar individual defendants assert their personal rights as well as their rights as office holders (A. 27-28), and the constitutional challenges are based upon different grounds. Thus, the case at bar raises questions which were not decided in *Katzenbach*.

However, the decision in *Katzenbach* is instructive. The Voting Rights Act suspended registration tests in those states and political subdivisions which came within its coverage formula (Section 4), to wit: (1) those which used tests or devices (e.g. literacy tests) for voter registration, and (2) which had poor voter turnout in the 1964 presidential election (383 U.S. at 330). The Court stated the question before it to be (383 U.S. at 324): "Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?" The fundamental ground of South Carolina's challenge was that the Act exceeded the powers of Congress and encroached on an area reserved to the states (383 U.S. at 323). The Court said that (383 U.S. at 324): "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." The Court then found that the States affected by the coverage formula were those which Congress had legitimately determined used tests and devices discriminatorily. The coverage formula was held to be rational (383 U.S. at 330, 331). Section 5 (review of new voting laws) was upheld because some of the covered States had resorted to the extraordinary strategem of contriving new rules to circumvent adverse federal court decrees, and the Court held, under "these unique circumstances", that "exceptional conditions" can justify legislative measures "not otherwise appropriate" (383 U.S. at 334-335).

Let us now examine the Voting Rights Act as and if applied to reapportionment. First, the coverage formula is completely unrelated to the problem. The basis of reapportionment is population, not registered voters, and the voter participation in the 1964 presidential election

is completely foreign to the apportionment of a State legislative body. Moreover, reapportionment is a national problem; it is not unique to Georgia, Alabama, Louisiana, Mississippi, South Carolina, Virginia, and some counties in North Carolina. New York, Florida, Texas and Indiana, to mention only a few, have had serious reapportionment disputes. Finally, as for Section 5 itself, there is no evidence of any resort to contriving new apportionment plans to circumvent federal court decrees. There is only evidence of adopting new plans to meet the smaller and smaller deviations permitted by federal courts.

Thus, the reasons for which Section 5 was held valid in *Katzenbach* simply are inapplicable if that section is applied to reapportionment. The unique circumstances, of geography and circumvention, are not present in the reapportionment field so as to justify this inappropriate legislative measure.

Let us assume for the moment that Congress enacted a law, entitled the Reapportionment Approval Act of 1965, requiring certain States, which had literacy tests and in which voter participation in a presidential election was low, to submit their reapportionment acts to either the District Court in Washington or to the Justice Department for approval. Would that be appropriate legislation as authorized by the 15th Amendment? We submit that such an Act clearly would not be "appropriate" under the 15th Amendment. Yet the court below has held that the Voting Rights Act has that effect and nevertheless is valid.

We respectfully submit that Section 5 is not "appropriate legislation" within the meaning of Section 2 of the 15th Amendment if Section 5 is applied to reapportionment, and that if so applied that section unduly impinges

upon the rights, privileges and immunities of the people and the States (Art. IV, Sec. 2; Amendments 9 and 10).

Moreover, Section 5 denies the full faith and credit to which Georgia's laws are entitled under the Constitution (Art. IV, Sec. 1), and, when applied to reapportionment, leaves Georgia without a House of Representatives; i.e. without a republican form of government, contrary to the guaranty clause (Art. IV, Sec. 4). See *Bauers v. Heisel*, 361 F.2d 581 (C.A. 3, 1966).

We most respectfully submit that this Court should declare Section 5 of the Voting Rights Act unconstitutional as applied to reapportionment.

2. The Attorney General Has No Power Under Section 5 to Disapprove an Election System Which Has Not Changed.

If Section 5 is applicable to reapportionment and if it is constitutional as applied, then the interpretation and construction of Section 5 become critical to the thirteen covered and affected States.

The first of these questions involves the scope of review by the Justice Department under Section 5.

It is clear that Section 5 requires submission only of voting laws ". . . different from that in force or effect on November 1, 1964. . . ." Section 5 suspends only "new" voting regulations. *South Carolina v. Katzenbach, supra*, 383 U.S. at 334. It requires submission of any "change" in election laws. *Allen v. Board of Elections, supra*, 393 U.S. at 549.

It is equally clear that Georgia was using multi-member districts continuously from 1880 to date (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51),

and was using designated posts and majority election prior to November 1, 1964.

It is also clear beyond doubt that the Justice Department objected, nevertheless, to Georgia's use of multi-member districts. Mr. Harry Piper, speaking for the Government, stated to the court below (A. 55-56):

> "The United States does not contest that there was a majority-win, or runoff, provision in the Georgia Election Code as of November 1, 1964. We also do not contest that in 1964 a candidate had to qualify for a particular post by naming the incumbent he would run against. We had suggested removing the post provision and majority requirement as a way of alleviating our real objection, which was to the multi-member districts in the submitted plan."

It is our position that the Justice Department was without power to object to Georgia's use of multi-member districts, which Georgia has been using since 1880, because there has been no "change".

We have said that Section 5 clearly suspends, and requires submission of, "new" voting laws; i.e., "changes" in voting laws. We contend that Section 5 is equally clear that it authorizes the Justice Department to disapprove only the "change", because, as was stated in *South Carolina v. Katzenbach, supra,* 383 U.S. at 335, the purpose of Section 5 was to prevent the contrivance of "new" rules to evade the suspension of literacy tests. However, the Justice Department interprets Section 5 differently. They contend that the "change" only "triggers" the requirement of submission and ". . . does not necessarily limit the standards of review or the permissible range of ob-

jection resulting from such review." (R. 170, Plaintiff's Brief to the District Court, pp. 12-13.)

We submit that Section 5 was extended in *Allen* and *Perkins, supra,* to cover certain "election" law changes in addition to "voting" law changes. Now, if Section 5 does not limit the Justice Department's "standards of review" or its "range of objection", then Section 5 is being extended even further.

Permit us momentarily to assume a hypothetical situation for the purpose of illustrating the awesome scope of the power claimed by the Justice Department. The Georgia House of Representatives had 205 members in 1961. It had 205 members in the reapportionment of 1965. Assume that the 1972 reapportionment plan called for 205 members, but that the district lines were changed considerably as compared to 1961 and 1965. Under the Justice Department's interpretation of Section 5, the Attorney General might decide that a House composed of 225 members would increase minority representation and he could object to the continued use of 205 members because the change in district lines "triggered" the requirement of submission, but the Attorney General was not limited to objecting to that which had "changed". *Cf. Sixty-Seventh Minnesota State Senate v. Beens,* 406 U.S. 187 (1972).

The Justice Department's contentions make it imperative that Georgia raise the question: Does Section 5 empower the Attorney General to disapprove a law which has not "changed" within the meaning of that Section?

In the case at bar, the Justice Department notified the Georgia General Assembly in the closing days of its session that the use of multi-member districts, in combina-

tion with the designation of posts and majority elections, was disapproved. The Justice Department did not say to the General Assembly that multi-member districts numbered 62, 65, 74, 76, 77, 85, 86, 87, 89, 102, 114, 115, 122, 124 and 128 were disapproved as being new multi-member districts, or as being multi-member districts with changed boundaries, or as having had the number of members changed. By disapproving the use of multi-member districts as such, the Justice Department told the Georgia General Assembly to subdivide, into single member districts, all multi-member districts. After the General Assembly adjourned, the Government conceded in court that 17 of the multi-member districts to which it had objected either contained no cognizable racial minorities at all or had such dispersed minorities that the subdividing of those districts would not increase their voting strength (A. 59, 67-68). This corrective maneuver came too late to be acted upon by the adjourned General Assembly. By withdrawing in court its objection to 17 specified multi-member districts, the Government sought to object to the other 15 then identified districts (A. 69), thereby converting its original general objection to all multi-member districts into an objection to 15 specified districts.

We submit that the Government cannot use the District Court to correct its overtaking. In its letters of objection (A. 9 and 13), the Government objected to the use of multi-member districts, as such, not to 15 later identified districts. The Government's objection was either valid when made, or invalid, and its attempt in court to confine its objection cannot cure its original invalidity.

The Justice Department objected to the use of multi-member districts, in principle, notwithstanding this

Court's decision in June, 1971, in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), rendered shortly before Georgia's special reapportionment session. They objected to the system, not to its application in particular changed circumstances. Although the application of many multi-member districts had changed, the use of multi-member districts as an election system has not changed (since 1880).

Glynn County, Georgia, offers a perfect example of our complaint. Glynn County was a 2 man multi-member district in 1961 (Ga. Laws 1961, p. 111), a 2 man multi-member district in the reapportionment of 1965 (Ga. Laws 1965, p. 133), a 2 man multi-member district in the reapportionment of 1967 (Ga. Laws 1967, p. 192), a 2 man multi-member district in the reapportionment of 1968 (Ga. Laws 1968, p. 214), a 2 man multi-member district in the reapportionment of 1971, and a 2 man multi-member district in the reapportionment of 1972. Not since 1941 has there been any change whatsoever in the 2 man multi-member representation of Glynn County in the Georgia House of Representatives (see Ga. Laws 1951, pp. 26-27, Ga. Laws 1941, pp. 348-349), yet that district was disapproved by the Justice Department in its attack on multi-member districts. Even in court, the Justice Department maintained its objection to District 128 —Glynn County (A. 69, 63-64).

It has been said that Congress intended that Section 5 have a broad scope (*Allen, supra*, 393 U.S. at 568). It has not been said that Congress intended that the Attorney General have even broader powers under that broad Section. No court to our knowledge has said, as the Government here has said, that a change in a law "... only triggers the requirement for submission under

Section 5 and does not necessarily limit the standards of review or the permissible range of objection resulting from such review." (R. 170, Plaintiff's Brief in the District Court, pp. 12-13.) The Government's interpretation of Section 5 would render it overbroad.

In *Whitcomb v. Chavis, supra,* this Court said (403 U.S. at 160-161):

> "We are likewise at a loss to understand how on the court's own findings of fact and conclusions of law it was justified in eliminating every multi-member district in the State of Indiana."

We likewise are at a loss to understand how, without findings of fact (see section 3 of this brief, below), the Justice Department was justified in eliminating every multi-member district in the State of Georgia.

The Attorney General's objection to the use of multi-member districts, as such, is invalid, we submit, because Georgia was using multi-member districts, as such, in 1961, and continued to do so, with District Court approval, throughout the 1960's and in its 1971 and '72 reapportionment plans. The Justice Department exceeded its authority in objecting to laws as to which there had been no change.

3. The Attorney General Is Without Power to Disapprove a State Law Which He Does Not Find to Be Discriminatory, But About Which He Is Unable to Reach a Decision.

If Section 5 of the Voting Rights Act is applicable to reapportionment, and is constitutional as applied, and if it empowers the Attorney General to disapprove an election system which has not changed, then the question

arises: Does it empower the Attorney General to disapprove a law which he does not find to be discriminatory but about which he is unable to reach a decision?

In his March 3, 1972, letter disapproving Georgia's 1971 reapportionment plan, Assistant Attorney General David L. Norman wrote as follows (A. 10-11):

> "An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgement of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."[9]

This indecisive policy of denial is wrong, we respectfully submit. It is based upon Section 51.19 of the Attorney General's regulations. (Those regulations have no statutory basis, as will be shown in the following section of this brief.)

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[9] In his March 24, 1972, letter disapproving Georgia's 1972 plan, Mr. Norman wrote (A. 13):

> "After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972, letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for the reasons enunciated in my March 3, 1972, letter I must, on behalf of the Attorney General, object to S.B. 690 reapportioning the Georgia House of Representatives."

In view of Mr. Norman's reference to what a court would do, permit us to clear up one point immediately. Neither the Attorney General nor the Justice Department is a court. Const. Art. III, Secs. 1 and 2.

"The Attorney General does not act as a court in approving or disapproving the state legislation." *Allen, supra,* 393 U.S. at 549.

Notwithstanding *Allen,* the Attorney General is purporting to act as a court. His regulation §51.19 states that Section 5 of the Voting Rights Act ". . . imposes on the Attorney General what is essentially a *judicial function.*" (Italics added.) His regulation §51.19 continues:

> "Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia."

The Attorney General has put the same burden of proof for declaratory judgment on a submitting State as it would have in court, notwithstanding the fact that Section 5 says that the Attorney General's approval can be obtained "without such proceeding". The regulations continue (§51.19):

> "The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice."

The material on which the decision is based consists of three types: (a) material from the submitting authority, (b) material from individuals or groups, and (c) results

of investigations conducted by the Justice Department. By rule 51.26(a), material from individuals or groups may be withheld from the submitting State, and investigative reports shall be withheld from the State. Thus, the decision is based in part on material not available to the State. Therefore, the burden of proof is on the State notwithstanding the absence of any notice of the charges and of any right to cross-examine objectors.

The regulations continue (§51.19):

> "If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

Thus, there are three possible results: (1) The Attorney General will approve the *change* if he finds that it does not have a racially discriminatory purpose or effect, or (2) he will disapprove the *change* if he finds that it has a racially discriminatory purpose or effect, or (3) according to him, he may find that he cannot decide within 60 days, in which event he will disapprove the *change*.

The Norman letter does not follow options (1) or (2), and hence it presumably follows option (3), set forth in

the last sentence of §51.19, quoted above, which option is erroneous. Mr. Norman said (A. 11): ". . . I am unable to conclude that the plan does not have a discriminatory racial effect on voting."[10]

By adopting the burden of proof standard, the Attorney General has constituted his staff as a court, without providing the submitting State with notice of the charges, without the right to call witnesses, without the right to cross-examine objectors, and without any of the procedural rights necessary to a judicial proceeding.

In adopting Section 5 of the Voting Rights Act, Congress did not intend that the Attorney General should act as a court, applying the same burden of proof as a court, without providing procedural safeguards for the parties, as evidenced by the fact that Section 5 specifically provides that the Attorney General's approval can be obtained "without such proceeding". Congress did not, in Section 5 or elsewhere, establish the Attorney General as a court. Const. Art. III, Secs. 1 and 2.

Section 5 does not permit the Attorney General the option of not deciding. He may "interpose an objection" if he finds the change to have the purpose or effect of denying or abridging the right to vote. But he is not authorized to object unless he finds the change to be discriminatory. If he does not find the change to deny or abridge the right to vote, he should leave the matter to be resolved in private litigation as provided by Section 5 (". . . neither the Attorney General's failure to object

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[10] We are aware of the hope that §51.19 would resolve problems of indecision. *State Board of Election Commissioners v. Evers*, 405 U.S. 1001 (1972). However, indecision is itself a problem and §51.19 cannot resolve the underlying problem.

nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure").

Let us examine what happened in this instance. Mr. Norman based his decision on four District Court decisions, saying that he was persuaded that a court would invalidate the combination of multi-member districts, numbered posts, and the majority (runoff) requirement (A. 10). He relied first on a footnote in *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972). In that case private plaintiffs attacked North Carolina's anti-single shot law and its numbered seat law. Thirty-nine of North Carolina's 100 counties are covered by the Voting Rights Act of 1965. The anti-single shot law was enacted in 1955 but was made applicable in only 19 counties. The numbered seat law was enacted in 1967, was made applicable only to certain seats, and had been disapproved by the U. S. Attorney General as to those counties in which it applied which were under the Voting Rights Act. Thus, the numbered seat law applied to some seats and in some counties. The District Court held the anti-single shot law to be unconstitutional on equal protection grounds, because it applied to some counties and not to others, and the State had shown no justification for this difference in treatment. The Court held the numbered seat law to be invalid for the same reason. The Court expressly refused to decide whether the two laws had been selectively applied to abridge the rights of Negro voters in violation of the 15th Amendment. The decision did not deal with multi-member districts as such.

The second case relied upon by Mr. Norman (A. 11) was *Graves v. Barnes*, 343 F.Supp. 704 (W. D. Tex.

1972), a three judge, four opinion decision. In the *per curiam* portion of the opinion, Part II, the constitutional validity of multi-member districts was questioned. However, only one judge (District Judge Justice) concurred in Part II of the *per curiam* opinion. Multi-member districts in two Texas counties (Dallas and Bexar) were invalidated whereas nine multi-member districts in other areas were not. See *Graves v. Barnes*, 405 U.S. 1201 (1972). The two districts were invalidated on the basis of *Whitcomb v. Chavis*, 403 U.S. 124 (1971). The Dallas County 18 man multi-member district with 1,300,000 people (the equivalent of 3 congressional districts) was found to be invalid due to a "jay-bird" committee, the Dallas Committee for Responsible Government (DCRG), which controlled primaries and elections without appealing to the Negro vote. The Bexar County (San Antonio, population 830,460) 11 man multi-member district was held invalid on the basis of discrimination against Mexican Americans. The District Court did not invalidate multi-member districts per se.

The Alabama decision cited by Mr. Norman (A. 11), *Sims et al. v. Amos*, 336 F.Supp. 924 (M.D. Ala. 1972), is a one man-one vote case. The Alabama legislature met twice but failed to reapportion on the basis of the 1970 Census. Plaintiffs proposed a plan using single-member districts. Defendants proposed three plans, all using multi-member districts. The best of the three had a 29.97% deviation in the House and 24.28% in the Senate. The Court rejected the defendants' plans, citing *Connor v. Johnson*, 402 U.S. 690, 692 (1971), for the proposition that in court fashioned apportionment plans single-member districts are preferable. The Court, following *Connor*,

adopted plaintiffs' single-member plan with a 2.23% deviation in the House and 1.39% in the Senate.

The last case cited by Mr. Norman (A. 11) was *Bussie v. Governor of Louisiana*, 333 F.Supp. 452 (E.D. La. 1971). There the Louisiana legislature adopted House and Senate plans, suit was filed, the plans were submitted to the U. S. Attorney General under Section 5, and he found them to be racially discriminatory and disapproved them. The Court then appointed a special master to formulate a plan. His plan, which the Court adopted, used single-member districts. Objection to the use of single-member districts was overruled by the Court. Although not cited, it is clear that use of single-member districts by the master was in accord with *Connor, supra*.

Thus, what do we have? Four court decisions, not one of which holds that the use of multi-member districts, designated posts and majority (runoff) requirement, singly or in combination, is racially discriminatory per se. Georgia's reapportionment of its House of Representatives was disapproved in Washington based on *obiter dictum*. The Government disapproved Georgia's use of multi-member districts, per se. And that disapproval was directly contrary to the holding of this Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

In *Whitcomb*, the Court reversed the District Court which had held multi-member districts to be invalid. The Court reiterated its holdings that multi-member districts are not per se illegal, and said (403 U.S. at 144):

> "But we have insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting

strength of racial or political elements. We have not yet sustained such an attack."

The Attorney General, by his regulations and the test used in this case (§51.19), has taken the burden of proof from those challenging multi-member districts and has put that burden on the State, contrary to *Whitcomb*. In this case, §51.19 could be classified as an extraordinary strategem which flies in the face of an adverse federal court decree. If the Justice Department were going to invalidate all multi-member districts in the face of *Whitcomb*, its lawyers could have said so before Georgia's special reapportionment session. The Attorney General's burden of proof test and indecisive denial policy is, we submit, invalid.

4. The Attorney General Is Without Power to Extend the 60 Day Time Limit Congress Set in Section 5.

By letter dated March 24, 1972 (A. 13), the Justice Department disapproved the House of Representatives reapportionment plan adopted on March 9, 1972, the last day of the 1972 regular session.

If Section 5 is applicable to reapportionment and valid as applied, if it empowers the Attorney General to disapprove an election system which has not changed, and if his burden of proof standard and indecisive denial policy are valid, then the March 9, 1972 reapportionment plan was timely disapproved and thus is suspended.

However, the reapportionment plan adopted at the 1971 special session was submitted, appellants contend, to the Justice Department on November 5, 1971 (A. 32). Its disapproval approximately 120 days later, by letter

dated March 3, 1972 (A. 9), was not within the 60 day time limit Congress placed on the Attorney General in Section 5, and hence the 1971 plan is in effect, appellants contend.

The Justice Department contends however that the 60 day time limit did not commence until January 6, 1972, by virtue of the Attorney General's regulations, Sections 51.18(a) and 51.10. If that be so, the March 3, 1972 objection was timely.

The Justice Department's argument assumes, however, the validity of the Attorney General's regulations, whereas none of the cited authorities authorizes the Attorney General to extend, by regulation or otherwise, the 60 day limit fixed by Congress for the suspension of State voting laws.

The Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (28 C.F.R. 51) cite as their "Authority" Section 5 of the Voting Rights Act, and 5 U.S.C. §301, and 28 U.S.C. §§509, 510.

Section 5 does not say anything about regulations. 5 U.S.C. §301 authorizes a department head to prescribe regulations for the government of his department and its employees, for the distribution and performance of its business, and for the custody and use of its records and property. It gives a department head only housekeeping authority. *N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868, 875 (C.A. 5, 1961).

28 U.S.C. §509 provides simply that the Attorney General is vested with all the functions of his subordinates, except with respect to hearing examiners, prisons and paroles. Reliance on 28 U.S.C. §509 as authority for

the promulgation of rules for the administration of Section 5 is untanned bootstrap.

28 U.S.C. §510 provides that the Attorney General may delegate his functions to his subordinates.

There is no statutory authority for the Attorney General's rules.

In *Allen, supra,* the Mississippi appellees argued that service of their briefs upon the Attorney General constituted a submission under Section 5. Rejecting that argument, this Court said (393 U.S. at 571):

> "While the Attorney General has not required any formal procedure, we do not think the Act contemplates that a 'submission' occurs when the Attorney General merely becomes aware of the legislation, no matter in what manner. Nor do we think the service of the briefs on the Attorney General constituted a 'submission'. A fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act."

We fear that the Attorney General's rules were promulgated pursuant to the statement in *Allen* that the Attorney General has not required any formal procedure. If the Court had said in *Allen* that the Attorney General has not abused his power, he could now cite *Allen* for the proposition that he has authority to do so.

The Attorney General has attempted to define what constitutes a submission, §51.10, so as to give himself an extension of time under his regulations §51.3(b) and

§51.18(a). However, what constitutes a submission under Section 5 is a judicial question, as in *Allen, supra,* not an administrative question.

The undisputed facts show that the 1971 reapportionment act, plus maps thereof, the 1968 reapportionment act plus maps of those districts, the population variances for each district, and the other materials listed on Complaint Exhibit 6 (A. 19-23), were all submitted to the Attorney General on November 5, 1971, with a request for his consideration (A. 19). This constituted a submission within the meaning of Section 5, *Allen, supra,* 393 U.S. at 571. Under Section 5, he had 60 days from November 5, 1971, in which to act.

On November 19, 1971, he asked for seven categories of materials, none of which related to multi-member districts, designated posts or the majority election requirement. Instead, they related to the 1970 census, by race, for the 1971 and past (1965 and 1968) reapportionment plans, names and addresses of all members of the House, histories of elections in which black candidates had run, and votes on the reapportionment bill and proposed alternatives.

The Attorney General disapproved on March 3, 1972, the plan which had been submitted to him on November 5, 1971. His disapproval came not within the 60 days fixed by Congress but about 120 days after submission. His disapproval of the 1971 reapportionment plan was invalid because ". . . the Attorney General has not interposed an objection within sixty days . . ." (Section 5) after it was submitted to him. Congress put no time limit in Section 5 on the District Court for the District of Columbia. It did, however, put a time limit on the Justice

Department. The Attorney General nevertheless contends that his authority to extend the 60 day limit placed on him by Congress comes from his own regulations, §51.18(a). That section reads in pertinent part as follows:

> "(a) If the submission does not satisfy the requirements of §51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice."

The §51.10(a) referred to above provides that a submission shall consist of six things, the sixth of which is that the Attorney General *may* require the submission of "other information", including, *but not limited to*, the more numerous things in part (b) of §51.10.

Because the requirements of §51.10 are the Attorney General's own requirements and because his subsection 6 allows him to require "other information", section 51.18(a), quoted above, actually reads as follows:

> If the submission does not satisfy me, I shall request other information and advise the submitting authority that the 60-day period [fixed by Congress] will not commence until I receive such other information as I request.

Defendants contend that the Attorney General had no authority to adopt his regulations, particularly regulations giving himself an extension of time under Section 5. He could just as well adopt regulations under Rule 12 of the Federal Rules of Civil Procedure saying that, by defining what constitutes a pleading asserting a claim, he

could extend his 60 days for answering a lawsuit until he had received all the information he requested from the plaintiff.

In *United States v. Robinson*, ____F.2d____ (C.A. 5 No. 71-1058, Jan. 12, 1972), the Fifth Circuit held that under the wiretap act only the Attorney General or an assistant attorney general specially designated by him could authorize a wire tap application. Could the Attorney General adopt a regulation providing that if he did not hear what he was listening for, he could give himself an extension of time and keep the wire tap running longer? We believe that he could not. Moreover, we believe that the laws of States are entitled to as much respect as private telephone conversations. The federal government, created by the States, owes the States at least obedience to the time limits fixed by Congress.

Clearly Section 5 gives the Attorney General no authority to promulgate regulations extending the 60 days set by Congress. The purpose of the provision was to limit the time in which new laws, duly adopted by a covered State, were held in abeyance, and to expedite effectuation of those new laws. See *Allen, supra*, 393 U.S. at 549. If it had seen fit to do so, the Congress could have put no time limit on the Attorney General, providing (as was done for the District Court for the District of Columbia) that a new law would not become effective "unless and until" approved by the Attorney General. Congress did not do so. Instead, it put a time limit on the Attorney General.

The Government has argued that Congress certainly did not expect that changes as complex as reapportionment plans could be reviewed within 60 days and without

supplying the Attorney General with such other information as he might request. That argument shows that Congress did not intend for the Attorney General to be reviewing reapportionment plans in the first place. If Congress did so intend, then the Attorney General should ask Congress for additional time, and funds to employ researchers and statisticians to compile the information he wants. Section 5 is onerous enough without burdening the States with additional duties under it.

The claimed power to extend the 60 day limit fixed by Congress is unauthorized. Thus, Georgia's reapportionment act adopted October 14, 1971, and submitted November 5, 1971, is in effect.

CONCLUSION

Georgia has tried to live under Section 5 of the Voting Rights Act. In itself, that section is galling. In its administration, it is oppressive.

When the Justice Department expanded Section 5 and disapproved a "change" that wasn't a change, Georgia realized that she could no longer submit without trying to lighten the burden of Section 5.

We ask this Court to declare Section 5 to be unconstitutional, at least as and if applied to reapportionment. We ask this Court to declare invalid the Justice Department's disapproval of the Georgia House of Representatives reapportionment plans on the ground that the Attorney General is without power to disapprove Georgia's use of multi-member districts because there has been no change. We ask this Court to declare that the Attorney General has no authority to promulgate regulations imposing an invalid burden of proof test and extending the 60 day time limit fixed by Congress.

We ask this Court to reverse the decision of the District Court.

Respectfully submitted,

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